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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

New York, N.Y.

4 v.

17 Cr. 147(PKC)

5 ANDREW COOK,

6 Defendant.

7 -----x

8 October 30, 2017
9 12:05 p.m.

10 Before:

11 HON. P. KEVIN CASTEL,

12 District Judge

13
14 APPEARANCES

15 JOON H. KIM

16 Acting United States Attorney for
the Southern District of New York

17 BY: MICHAEL MCGINNIS

18 Assistant United States Attorney

19 MYSLIWIEC, MIEDEL & MYSLIWIEC, LLP

Attorneys for Defendant

20 BY: AARON J. MYSLIWIEC

21
22
23 ALSO PRESENT:

24 ABIGAIL SHUSTER, Paralegal

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1 THE COURT: This is United States v. Andrew Cook.
2 For the government.

3 MR. MCGINNIS: Good morning, your Honor. Michael
4 McGinnis for the United States.

5 THE COURT: And for the defendant.

6 MR. MYSLIWIEC: Good morning, your Honor, Aaron
7 Mysliwicz for Mr. Cook, and I am joined by Abigail Shuster of
8 my office.

9 THE COURT: Good morning to you both.

10 Let me inquire. You are fully retained for this
11 matter, is that correct?

12 MR. MYSLIWIEC: That's correct.

13 THE COURT: What is the status of the other lawyers
14 who have entered notices of appearance? There was a Mr. Greco;
15 of course, Ms. Willis; there seems to be a Mr. Myers and a
16 Mr. Schwartz.

17 Are any of these in the case?

18 MR. MYSLIWIEC: Not any longer, depending upon what
19 you determine today, your Honor. Mr. Myers was the last lawyer
20 who was in the case.

21 THE COURT: And where is he today? You don't know.

22 Does the government know where he is?

23 MR. MCGINNIS: No, your Honor.

24 MR. MYSLIWIEC: I have spoken with him a couple of
25 times, and I am talking to him again today, to the extent that

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1 that is useful for your Honor.

2 (Pause)

3 THE COURT: Who is Mr. Schwartz? David A. Schwartz,
4 retained.

5 MR. MYSLIWIEC: He was originally a lawyer who was
6 on -- this case started in New Jersey state court, and David
7 Schwartz was representing Mr. Cook there. He wasn't -- he
8 didn't end up being retained to represent him on the federal
9 matter.

10 THE COURT: All right. He shows up on the docket
11 sheet, but apparently Mr. Myers has appeared in this action and
12 he remains as counsel of record in this action.

13 You have filed a notice of appearance, correct?

14 MR. MYSLIWIEC: That's correct.

15 THE COURT: So you also are counsel in this action,
16 but, as Mr. Myers knows, or should know, you don't drift out of
17 a case -- is that Mr. Myers?

18 MR. MYERS: It is.

19 THE COURT: Oh. Thank you.

20 MR. MYERS: Matthew Myers, M-y-e-r-s.

21 THE COURT: Mr. Myers, you can ignore the message that
22 I left with your office just a moment ago.

23 MR. MYERS: Okay. The clerk was supposed to call from
24 magistrate court up here. In the middle of the allocution I
25 literally told the clerk, where I have been for an hour, so I

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1 wouldn't be rude in being late.

2 THE COURT: I didn't say you were rude. I said I
3 called your office and I left a message and you can disregard
4 the message, Mr. Myers.

5 MR. MYERS: Oh, I thought that you didn't get the call
6 from magistrate court.

7 THE COURT: I got no call.

8 MR. MYERS: That's what I am apologizing for.

9 THE COURT: Okay.

10 (Pause)

11 THE COURT: We did not get a identification from
12 magistrate's court of who they were calling about, so we did
13 not know, otherwise we wouldn't be having this conversation.

14 MR. MYERS: At 11:15 I made sure I told the clerk that
15 this allocution is going to go too long. I apologize.

16 THE COURT: All right. They got half of a message,
17 but not the entirety.

18 MR. MYERS: Okay. Sorry for the confusion.

19 THE COURT: All right.

20 What is Mr. Cook's application at this stage?

21 MR. MYSLIWIEC: His application is to have me appear
22 in the case and replace Mr. Myers.

23 THE COURT: Mr. Myers, do you have any objection to
24 that?

25 MR. MYERS: No objection.

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1 THE COURT: Mr. Cook, you heard what the lawyers have
2 just said. They are reporting to me that you wish to have
3 Mr. Myers withdraw from this action and, Mr. Cook, you wish to
4 have Mr. Mysliwiec represent you in this action. Is that
5 correct.

6 THE DEFENDANT: Yes, your Honor.

7 THE COURT: And you understand that this is a very
8 serious step and that it is not likely that I will grant
9 further time relating to a substitution of counsel in this
10 case.

11 THE DEFENDANT: Yes, your Honor.

12 THE COURT: Mr. Myers, it is your desire and request
13 to withdraw from the action?

14 MR. MYERS: Yes, your Honor.

15 THE COURT: All right. That application is granted,
16 and you are deemed withdrawn from the action, and your role in
17 the case is terminated. I trust and know that, as a member of
18 the bar of this court, you will cooperate with new counsel to
19 make sure that he is up to speed on everything.

20 MR. MYERS: Certainly.

21 THE COURT: Thank you. You are excused.

22 MR. MYERS: Thank you. Good luck.

23 THE DEFENDANT: Thank you.

24 THE COURT: Let me hear your application with regard
25 to schedule here. I had set a date for counsel to advise

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1 whether there are any motions to be made in this case, and now
2 what would you like me to do? Let me hear it.

3 MR. MYSLIWIEC: So, your Honor, I have the same
4 application I made when I filed my letter concurrently with
5 filing the notice of appearance. I have already, in
6 anticipation of the possibility of being retained, I have
7 already reviewed the docket, past filings in the case. I have
8 reviewed all of Mr. Myers' file in the case. I have begun
9 reviewing what I had, which are three disks of discovery. The
10 government has informed me it is about a half terabyte of
11 information all together. I made headway on that last week and
12 over the weekend and, as I indicated in the letter, this would
13 be about the fifth case I have represented someone in the
14 Southern District of New York where the allegations are based
15 on allegations of a synthetic controlled substance. None of
16 the other cases involved MXE, which is the acronym for the
17 substance here, but I have worked with experts who are the
18 same, essentially, the same field of experts who would be
19 involved in this case. I have already consulted one of those
20 experts about MXE. There has been some other litigation in the
21 country in the District of Kansas where MXE was one of the
22 substances, I have reached out to that practitioner regarding
23 expert reports that were filed in that case and some litigation
24 that was involved in that case. So I have moved as quickly as
25 possible in the short term that I have become aware of the

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possibility of coming into the case.

All that being said, I think the motion deadline had been October 27. I consulted with the government, both about other kinds of issues and the motion deadline, asked them if they had any objection to a November 30 motion date. They have no objection. I could guarantee the court that, if I choose to file motions, I could make that November 30 date.

THE COURT: I am looking to have you report to me whether you have any motions you wish to make in the case, and then I know what kind of a schedule to set.

MR. MYSLIWIEC: I could give you a sense right now of what the two most likely motions are.

THE COURT: Yes, okay. Go ahead.

MR. MYSLIWIEC: The first motion is there was a search of his residence. There was a search -- there were search warrants obtained in New Jersey for that search, but there might be some issues about whether or not information was properly relayed to the court and whether there was a proper basis for the court to grant those search warrants.

THE COURT: That would relate to the face of the warrant application and the warrant itself.

MR. MYSLIWIEC: Yes, your Honor.

THE COURT: Go ahead.

MR. MYSLIWIEC: So that's one area.

The second issue is more likely, again, I have done

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1 some research on the Federal Analogue Act, I'm not all the way
2 through that research. I think there have been constitutional
3 challenges to the act that have failed. There, I think, have
4 been -- there may be at least one constitutional challenge as
5 applied with respect to a specific substance that was at issue
6 in that case. I would anticipate the possibility of a
7 constitutional challenge as applied in this case being another
8 possible motion. Again, I have more research to do. My
9 understanding is that that MXE prosecutions are fairly rare. I
10 know from talking to Mr. Myers there was a prior court
11 appearance where he raised this kind of issue, and the court
12 suggested that was more a factual issue than a legal issue.
13 Because of some of the issues regarding MXE, there may be an
14 "as applied" challenge with respect to it. But those are the
15 most likely two motions that I would file.

16 THE COURT: All right. This is what I am going to do.

17 I will set the motion deadline for those two motions
18 as November 30, 2017. The government may have until December
19 15 to respond, and you may reply by December 29, and I will
20 have you all back on January 3 at 2 p.m. for a conference.

21 Does that work for the government?

22 MR. MCGINNIS: Yes, your Honor.

23 THE COURT: For the defendant?

24 MR. MYSLIWIEC: Yes, if I can just check the 3rd.

25 THE COURT: Yes.

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1 MR. MYSLIWIEC: That's good.

2 THE COURT: And I will hear the government's
3 application.

4 MR. MCGINNIS: Yes, your Honor. The government would
5 move to exclude time between now and January 3 so that defense
6 counsel can review discovery and prepare motions in preparation
7 for trial.

8 MR. MYSLIWIEC: We agree.

9 THE COURT: I find that the ends of justice will be
10 served by granting a continuance to January 3 and that the need
11 for a continuance outweighs the best interest of the public and
12 the defendant in a speedy trial.

13 The reasons for my finding are that time is needed to
14 prepare the motions, brief the motions, the court to consider
15 the motion papers; and, accordingly, the time between now and
16 January 3 is excluded under the Speedy Trial Act.

17 I should say I am excluding the time out of an
18 overabundance of caution, and it is probably not necessary that
19 I exclude the time because I think it is excludable as a matter
20 of law. But, nevertheless, I will exclude it.

21 Anything further from the government?

22 MR. MCGINNIS: Yes, your Honor. I just want to make
23 sure I am fully prepared for the January 3 conference. Do you
24 expect counsel to be prepared to argue the motions at that
25 time.

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1 THE COURT: I do or to answer questions about them, to
2 argue them, answer questions about them, and also to address
3 any and all issues in this case, including further schedule and
4 further proceedings. As is always the case, everything is
5 always on the table at every conference.

6 MR. MCGINNIS: Absolutely, your Honor. Thank you so
7 much.

8 THE COURT: Okay. Anything further from the
9 defendant?

10 MR. MYSLIWIEC: No, your Honor. Thank you.

11 THE COURT: Thank you all very much.

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